90-1677

NO. _____

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN F. STARNS,
BEVERLY J. STARNS
JEFFREY A. STARNS

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GWENDOLYN JO M. CARLBERG
Law Offices of Gwendolyn Jo M. Carlberg
420 South Washington Street
Alexandria, Virginia 22314
703/549-5551

Counsel for Petitioners

QUESTION PRESENTED FOR REVIEW

Whether Congress intended federal courts to apply state law or federal law in determining whether the United States can be held liable as a "private individual under like circumstances" within the meaning of 28 U.S.C. §1346(b) and 28 U.S.C. §2674 of the Federal Tort Claims Act.

LIST OF PARTIES

The parties to these proceedings are John F. Starns, the father of the injured child; Beverly J. Starns, the mother of the injured child; and Jeffrey A. Starns, the injured minor child.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

John F. Starns, Beverly J. Starns and Jeffrey A. Starns, Petitioners herein, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported as Starns, et al. v. United States, 923 F.2d 34 (4th Cir. 1991), and is also set out in its entirety in the Appendix hereto at pages 1 - 18. The opinion of the District Court for the Eastern District of Virginia, which the Fourth Circuit affirmed in part and reversed in part and remanded, is not reported as it is under seal. The Judgment Order and Memorandum Opinion is set forth in its entirety in a separate

Appendix under seal at pages 1 - 38. The per curiam opinion of the Supreme Court of Virginia is unpublished as it is under seal and is set forth in its entirety in the separate Appendix at page 43.

GROUNDS FOR JURISDICTION

This case involves the review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on January 9, 1991. Petitioners filed a petition for rehearing with a suggestion for rehearing en banc. The petition for rehearing was denied on February 1, 1991. In accordance with Rule 13 of this Court, this petition was filed within ninety days from the date of the denial of the petition for rehearing.

This Court has jurisdiction to review judgments of the courts of appeal by writ of certiorari as provided in 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §1346(b) - U.S. As Defendant

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §1652 - State Laws As Rules of Decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. §2674 - Liability of the U.S.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

§8.01-581.1, CODE OF VIRGINIA

DEFINITIONS:

1. "Health care provider" means a person, corporation, facility or

institution licensed by this Commonwealth to provide health care or professional services as a physician or hospital, dentist, pharmacist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, physical therapy assistant, clinical psychologist or a nursing home as defined in §54-900 of the Code of Virginia except those nursing institutions conducted by and for those who rely upon treatment by spiritual means alone through prayer in accordance with a recognized church or religious denomination, or any officer, employee or agent thereof acting in the course and scope of his employment.

2. "Physician" means a person licensed to practice medicine or osteopathy in this Commonwealth pursuant to Chapter 12 (§54-273 et seq.) of Title 54.

3. "Patient" means any natural person who receives or should have received health care from a licensed health care provider except those persons who are given health care in an emergency situation which exempts the health care provider from liability for his emergency services in accordance with §54-276.9 of the Code of Virginia.

4. "Hospital" means a public or private institution licensed pursuant to Chapter 16 (§32-297 et seq.) of Title 32 or Chapter 8 (§37.1-179 et seq.) of Title 37.1 or subject to the provisions of Chapter 10 (§32-147 et seq.) of Title 32.

5. "Malpractice" means any tort based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient.

6. "Health care" means any act, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical diagnosis, care, treatment or confinement. . . .

§8.01-581.15, CODE OF VIRGINIA

LIMITATION ON RECOVERY IN CERTAIN MEDICAL MALPRACTICE ACTIONS. -- In any verdict returned against a health care provider in an action for malpractice where the act or acts of malpractice occurred on or after April one, nineteen hundred seventy-seven which is tried by a jury or in any judgment entered against a health care provider in such an action which is tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed seven hundred fifty thousand dollars.

STATEMENT OF THE CASE

I. NATURE OF THE CASE:

These are three consolidated cases brought by John F. Starns, Beverly J. Starns and Jeffrey A. Starns, the injured minor child by his next of friend and his parents, pursuant to the Federal Tort Claims Act seeking recovery for damages for personal injuries sustained by Jeffrey A. Starns as a result of medical malpractice and negligence on the part of employees of a United States Army hospital where Jeffrey A. Starns and Beverly J. Starns were patients.

II. STATEMENT OF FACTS, PROCEDURAL HISTORY OF THE CASE AND DISPOSITION IN THE COURTS BELOW:

A. COURSE OF PROCEEDINGS

Jeffrey A. Starns (hereinafter referred to as "the Child"), Beverly J. Starns (hereinafter referred to as "the Mother"), and John F. Starns (hereinafter referred to as "the Father"), each brought

a separate personal injury action against the United States and two named individual Defendants, Dr. Janet Spitzer and Dr. R. Nobarian. John F. Starns and Beverly J. Starns (hereinafter referred to as "the Parents" when referred to jointly) are the parents of the Child.

These actions were brought by the Plaintiffs pursuant to the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2671 et seq., and sought both compensatory and punitive damages for negligent diagnosis and treatment of the Child and for negligent infliction of emotional distress upon the Mother and the Father. The three complaints also demanded trial by jury on all issues contained in the complaints.

The Child was born on June 3, 1982 at DeWitt Army Hospital at Fort Belvoir, Virginia. His birth was normal and without any complications. At the

time of his birth, it was determined that he was a hemophiliac.

From June 4 to June 6, 1982, the Child and the Mother were patients at the DeWitt Army Hospital. During this time, the Child became lethargic, slept most of the time and was difficult to arouse. The Mother brought this to the attention of the nurses and doctors. The United States stipulated that it breached the standard of care and was negligent in the medical treatment rendered to the Child while at DeWitt Army Hospital.

On June 6, 1982, the DeWitt Army Hospital discharged both the Child and the Mother. On June 7, 1982, the Child was rushed to Walter Reed Army Medical Center where emergency surgery was performed to save his life and arrest an intracranial hemorrhage. Today, the Child experiences permanent intellectual and

physical deficits as a direct cause of the negligence of the United States. The United States has stipulated to causation and liability for the Child's permanent injuries.

B. STATEMENT OF FACTS

Many of the facts in the cases at bar have been stipulated to; however, it is important to point out that:

The United States admits that the doctors who were negligent were agents of the United States who were acting within the scope of their employment at all times alleged in the three complaints.

As a direct cause of United States' negligence, the Child suffered brain damage; has seizures; is a mildly to borderline retarded Child whose condition is permanent; has an IQ of between sixty three (63) and seventy (70); has a shunt in his brain and will need comprehensive

care for the rest of his life. He is constantly at risk as he has no ability to reason and has coordination problems due to a lack of gross motor skills.

C. DISPOSITION IN COURTS BELOW

On February 29, 1988, the three Petitioners filed a lawsuit against the United States for personal injuries pursuant to the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671, et seq.

On October 17 and 18, 1988, a trial was held before the Honorable James C. Cacheris who, after hearing the evidence and argument of counsel, took the case under advisement.

On November 23, 1988, the Trial Court certified questions to the Virginia Supreme Court under seal. The question pertinent to this Petition is number four which reads:

> Does the medical malpractice cap set forth in §8.01-581.15 of the Virginia Code apply to this case, given that the DeWitt Army Community Hospital is federally operated and is not licensed by the Commonwealth of Virginia?

On April 13, 1989, the Supreme Court of Virginia gave its answer to question number four:

> The fourth certified question also is answered in the negative Richman v. National Health Laboratories, 235 Va. 353, 367 S.E.2d 508 (1988).

A Judgment Order for damages accompanied by a Memorandum Opinion was entered by the District Court on July 27, 1989 (Appendix Under Seal Pages 1 - 38). From this Judgment Order for damages, the Plaintiffs filed their appeals on August 25, 1989 to the Court of Appeals for the Fourth Circuit.

The Court of Appeals for the Fourth Circuit rendered its decision on January 9, 1991 (Appendix pages 1 - 18).

Plaintiffs timely filed a Petition for Rehearing with a Suggestion for Rehearing En Banc which was denied on February 1, 1991.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

This Court should grant a petition for certiorari. The decision of the Fourth Circuit directly conflicts with the decisions of other circuits; directly conflicts with decisions of the Virginia Supreme Court; is contrary to the decisions of this Court; and raises important issues of federal law governing the interpretation and application of the Federal Tort Claims Act in granting damages in medical malpractice cases

wherein the states have enacted medical malpractice acts limiting damages.

The Court of Appeals has interpreted the "if a private person" language of 28 U.S.C. §1346(b) and the "private individual under like circumstances" language of 28 U.S.C. §2674 to be a limitation on the waiver of sovereign immunity under the Federal Tort Claims Act and found it was not required to apply the law of the state where the act occurred. This is in direct conflict with this Court's decision in Rayonier Incorporated v. United States, 352 U.S. 315 (1957).

The Fourth Circuit's refusal to allow the Starns to recover an amount of more than the Virginia Medical Malpractice Act's limitation on damages of $750,000.00 was based on the Appellate Court's interpretation of a health care provider in Virginia, which is in direct conflict

with the Virginia Supreme Court's interpretation of its law.

This is a case of first instance in which the highest court of a state has ruled on the definition of a health care provider under its medical malpractice act. The Appellate Court's refusal to follow this definition and interpretation is in direct conflict with the decisions of other courts of appeal and this Court which have addressed the issues of the United States Government's liability being determined by the law of the place where the act or omission occurred.

Even if this Court does not find that the issues presented warrant the grant of certiorari in this case, Petitioners respectfully request this Court to hold this case pending its decision on the merits in Molzof v. United States, 911

F.2d 18 (7th Cir. 1990), Docket No.90-838, certiorari granted on March 18, 1991.

In Molzof, the issue presented is what legal standard governs the interpretation of the term "punitive damages", which are prohibited by the Federal Tort Claims Act. Although some courts have adopted a purely federal law definition of "punitive damages" other courts have found that this construction would "impinge seriously upon the architecture of the Act which provides for recovery according to the lex loci delictus". Shaw v. United States, 741 F.2d 1202 (9th Cir. 1984), quoting Felder v. United States, 543 F.2d 657 (9th Cir. 1976). This Court will accordingly have to determine the extent to which Congress intended state law to impact the interpretation of the term "punitive damages".

Since the fundamental issue in this case is whether Congress intended state law or federal law to determine whether the United States could be found liable under the Virginia malpractice cap, the determination in Molzof could significantly affect the decision in this case. It would, therefore, be appropriate to hold this case so that the Fourth Circuit could re-evaluate its decision in light of this Court's decision in Molzof.

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH DECISIONS RENDERED BY THE FIRST, SIXTH AND NINTH CIRCUITS AND WITHIN THE FOURTH CIRCUIT ON THE SAME ISSUE

In an action brought under the Federal Tort Claims Act, the components and measure of damages are controlled by the law of the state where the tort occurred. Richards v. United States, 369 U.S. 1 (1962); 28 U.S.C. §1346(b).

The Act in 28 U.S.C. §1346(b) further provides that liability is:

> under circumstances where the United States, if a private person, would be liable . . . in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2674 as regards liability states:

> . . . in the same manner and to the same extent as a private individual under like circumstances . . .

It is the interpretation by the Fourth Circuit Court of Appeals in these three areas of the Act as they apply to the Virginia Medical Malpractice Act that causes this petition to be filed.

Virginia is the only state which has a cap on economic damages with no other means of recompense to the injured party. Also, Virginia is the only state in which the highest court, the Supreme Court of Virginia, has rendered decisions in

defining "health care provider" and in ruling who falls within the scope of the medical malpractice cap and thus has the benefit of a cap on damages. Richman v. National Health Laboratories, 235 Va. 353, 367 S.E.2d 508 (1988); Starns v. United States, Record No. 881289 (April 12, 1989) (Appendix Under Seal page 43). Gonzalez v. Fairfax Hospital System, Inc., et al., 239 Va. 307, 389 S.E.2d 458 (1990).

Several courts of appeal have rendered decisions on the definitions of "health care provider". In all of those cases, the federal courts have had to make assumptions and "deem" what a health care provider would be under the "like circumstances" and "private individual" language of §1346(b) and §2674 of the Act since no state's highest court had rendered a decision except Virginia. However, the appellate courts have not

applied these sections in the same manner, they have not been consistent within the same circuit, nor have they followed the holdings of this Court.

A. WAIVER OF SOVEREIGN IMMUNITY

The Fourth Circuit found that the extent to which the federal government has waived its sovereign immunity under the Federal Tort Claims Act is limited when it stated:

> In a suit under the FTCA, a plaintiff may only recover against the government to the extent the government has waived its sovereign immunity. While Virginia law informs us on how a private party would be treated, it is incapable of telling us to what extent the federal government has waived its sovereign immunity. See Reilly v. United States, 863 F.2d 149, 162 (1st Cir. 1988); Lucas, 807 F.2d at 417.

Relying on holdings in the First, Fifth, Ninth and Eleventh Circuits and ignoring the decisions of the Supreme Court of Virginia to the questions

certified to it by the District Court and other Virginia cases on this issue, the Appellate Court limited the total damages of all three claims to $750,000.00.

Federal Courts have emphasized that the Federal Tort Claims Act clearly waives the Federal Government's sovereign immunity in most tort actions. McNamara v. United States, 199 F.Supp. 879, 880 (D. D.C. 1961); American Exchange Bank of Madison, Wisconsin v. United States, 257 F.2d 938, 940 (7th Cir. 1958); Curry v. United States, 129 F.Supp. 38, 41, (D. S.C. 1954); Gilroy v. United States, 112 F.Supp. 664, 666 (D. D.C. 1953).

The Court in Ira S. Bushey & Sons, Inc. v. United States, 276 F.Supp. 518, 526 (D. N.Y. 1967), aff'd, 398 F.2d 167 (2nd Cir. 1968), stated that 28 U.S.C. §2680 excludes from the Federal Tort Claims Act only those torts mentioned in

it. "These exceptions are to be narrowly construed." McNamara v. United States, 199 F.Supp. at 881.

It has been noted that "where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule [of strict construction] cannot be had in order to enlarge the exceptions". Employers' Fire Insurance Co. v. United States, 167 F.2d 655, 657 (9th Cir. 1948).

B. LIKE CIRCUMSTANCES, PRIVATE PERSON AND SUBSTANTIVE LAW

The Federal Tort Claims Act provides for jurisdiction in federal courts when a tort has been committed by a government employee, while acting within the scope of his or her duty, "under circumstances where the United States, if a private person, would be liable to the

claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b).

Furthermore, 28 U.S.C. §2674 sets the Government's liability in such matters as "in the same manner and to the same extent as a private individual under like circumstances."

It is state law that informs us how a private party would be treated. The Appellate Court for the Fourth Circuit in Starns admitted such in its decision. Then it erroneously relied on four cases that allegedly say that Virginia's highest court's interpretation of its own laws, which inform us on how a private person should be treated, are irrelevant. These cases are Reilly v. United States, 863 F.2d 149 (1st Cir. 1988); Taylor v. United States, 821 F.2d 1428 (Ninth Cir. 1987); cert. denied 485 U.S. 992 (1988); Lucas v.

United States, 807 F.2d 414 (5th Cir. 1986); and Scheib v. Florida Sanitarium and Benevolent Association, 759 F.2d 859 (11th Cir. 1985).

There are other cases, including many within the Fourth Circuit itself, that insist that the state's own meaning as to its own laws are binding. in Rybolt v. Garrett, 112 F.2d 642, 644 (4th Cir. 1940) the court noted that:

> when the legislature of a state seems to have spoken in quite clear language and, when by so doing, the legislature appears to have declared a state policy with quite accurate precision, we are not willing to torture the language of the legislature or to distort its spirit, however keenly we may feel that the legislative policy is too rigid, undesireable, or even unfair.

This is especially true when the state's laws have been interpreted by state courts, particularly if the court is the State court of last resort. The

appellate court is "bound by the Virginia courts' interpretation of its statute". Lawrence v. Peyton, 368 F.2d 294, 297 (4th Cir. 1966). This policy was underscored two years later in Mesker Brothers Iron Company v. Donata Corporation, 401 F.2d 275 (4th Cir. 1968). See also Rutherford v. Blankenship, 468 F.Supp. 1357, 1361 (D.Va. 1979), wherein it was stated that "The Virginia Supreme Court's intrepretation as to the import of its own laws is conclusive."

Standing in clear opposition to the Fourth Circuit's reasoning in this case is Gallea v. United States, 779 F.2d 1403 (9th Cir. 1986). The issue in Gallea was whether a federal enclave which sells alcohol to an intoxicated minor is immune from tort liability under the Federal Tort Claims Act because it is exempt from California liquor licensing requirements.

After noting that the Government's liability depended on whether the state would impose liability on private persons or corporations under similar circumstances, pursuant to 28 U.S.C.§2674, which was to be determined by the construction of three California statutes, the appellate court stated:

> although no reported California decision has considered the effect of the 1978 amendments and §25602.1 on the liability of the United States, our review of California law convinces us that California courts would not impose liability. Gallea v. United States, 779 F.2d at 1405.

The 9th Circuit first sought out California courts' interpretation of the applicable law, and only when failing to find any such cases did it attempt to interpret the law itself. Then, it proceeded only to the extent of trying to determine what the state courts would have

ruled had there been state cases on that subject (emphasis ours).

Prior to Gallea the Ninth Circuit had considered a case involving an airplane crash and how the Federal Tort Claims Act was to be applied. The measure of damages, there as here, was to be based on state law. The Court also found that "the substantive state law includes the state statute as well as the state courts' interpretation. of that statute." Felder v. United States, 543 F.2d 657, 664 (9th Cir. 1976).

In the First Circuit, the Appellate Court in a case concerning the timeliness of filing a claim under the Federal Tort Claims Act, ruled that it must look to state law. The case was brought in Rhode Island but the act had occurred in Michigan so the law of Michigan was the law applied. It refused

to "second guess" the Michigan Supreme Court's interpretation of its own law. Caron v. United States, 548 F.2d 366, 367-68 (1st Cir. 1976), citing Erie v. Thompkins, 304 U.S. 64.

In the Fourth Circuit, there are cases which contradict the Appellate Court's ruling in Starns v. United States, 923 F.2d 34. Here the Fourth Circuit failed to interpret the law by looking at the leading case in which the Virginia Supreme Court construed the statute in question. This conflicts with the deci- sion in Johnson v. United States, 528 F.2d 489, 491 (4th Cir. 1975) wherein it was held that state substantive law includes the state's interpretation of its own laws.

Also decided in the Fourth Circuit was Corrigan v. United States, 815 F.2d 954 (Fourth Cir. 1987). Under the Federal Tort Claims Act, the lower court had found

the United States liable on a dram shop principle not yet ruled on by the Virginia Supreme Court. Before the case reached the appellate level, however, the Virginia Supreme Court did decide the effect of its own laws on dram shop liability, ruling that the act in question was not public safety legislation, thus disposing of the case before the Appellate Court and resulting in a determination that the United States did not fall into the class which would be held liable under the Act. The appellate court noted "It is of course the view of Virginia with regard to the effect of the regulation to which we must look". 815 F.2d at 957.

It is noteworthy that many of the federal cases also conflict with the Appellate Court's reasoning in Starns as to the importance of the licensing requirement. They follow Gallea in that

when a state statute expressly incorporates a licensing requirement as an element of liability, in order for that statute to be applicable, the license required is to be an actual one, not a hypothetical one. Gallea v. United States, 779 F.2d at 1406-07. (Kennedy, concurring opinion.)

Also, see Megge v. United States, 344 F.2d 31 (6th Cir. 1965), wherein a military officer's club, since it was not licensed by Michigan, was held not to be covered by an act concerning "vendors" which required such licensing. 344 F.2d at 33.

There are a number of federal cases imposing the protection of a state statute on the United States, though the statue applied only to those who had paid into the state's workman's compensation system. The courts in each of these cases

noted that the United States had, in fact, paid into a federal compensation system, or were indirectly paying the state workman's compensation fees by reimbursing the Government's contractor's for this fee. A quid pro quo had thus been made. General Electric Company v. United States, 813 F.2d 1273 (4th Cir. 1987); Griffin v. United States, 644 F.2d 846 (10th Cir. 1981); LaBarge v. Mariposa County, 798 F.2d 364 (9th Cir. 1986); Roeloffs v. United States, 501 F.2d 87 (5th Cir. 1974). Because compliance with the workman's compensation laws were done in fact and also in accordance with established policies, the statutes were effectively complied with and, therefore, the United States was covered by the statutes. Whether the result would be the same if the Government did not so comply was explicit and not decided in these cases.

See Roeloffs v. United States, 501 F.2d at 93; Griffin v. United States, 644 F.2d at 848.

Under the Federal Tort Claims Act, the United States has waived sovereign immunity and its liability is to be determined in accordance with whether, under state law, a "private individual or corporation under like circumstances" would be held liable. The Circuits are not totally clear, however, as to who is to decide which class the United States falls into under the various state statutes, the state or the federal government. The majority and better opinions stand for the principle that the state substantive law is to be interpreted by the state courts, especially by the State Supreme Court, and that their decision is binding.

In addition, still in conflict among the Circuits is whether a state statue expressly requiring licensing by the state in order for the statute to confer its protection over the United States applies when the Federal Government has not complied with the licensing procedure and has offered no quid pro quo for compliance.

The resolution of these conflicts are of paramount importance to assure uniformity of interpretation of these sections in Federal Tort Claims Act cases.

II. THE DECISION BELOW IS CONTRARY TO DECISIONS OF THIS COURT

The decision of the Fourth Circuit is in conflict with this Court's interpretation of the Federal Tort Claims Act as to the waiver of sovereign immunity and the applicability of state law. First, as

to sovereign immunity, the Fourth Circuit held in the case at bar that:

> In a suit under the FTCA, a plaintiff may only recover against the government to the extent the government has waived its sovereign immunity. While Virginia law informs us on how a private party would be treated, it is incapable of telling us to what extent the federal government has waived its sovereign immunity.

This construction of the Federal Tort Claims Act means that the waiver of sovereign immunity is not a complete waiver but one of limitations and degrees. This is contrary to congressional intent, the statutory language of the Act and the decisions of this Court. This construction results in a holding that the Federal Tort Claims Act is not applicable to this case due to a limitation of the waiver of sovereign immunity under §1346(b). This is directly at odds with this Court's numerous decisions that the Federal Tort

Claims Act clearly waives the Federal Government's sovereign immunity in most tort actions. Richards v. United States, 369 U.S. at 6; Dalehite v. United States, 346 U.S. 15 (1953); McNamara v. United States, 199 F. Supp. 879, 880 (D. D.C. 1961); American Exchange Bank of Madison, Wisconsin v. United States, 257 F.2d 938, 940 (7th Cir. 1958); Curry v. United States, 129 F. Supp. 38, 41, (D. S.C. (1954); Gilroy v. United States, 112 F. Supp. 664, 666 (D. D.C. 1953).

In Richards, this Court held that state law controls issues concerning the federal government's liability under the Federal Tort Claims Act absent "persuasive evidence to the contrary". 369 U.S. at 13. The Richards Court expressly declined to apply federal law to choice of law questions arising under the Federal Tort Claims Act, finding that Congress intended

federal courts to apply "the whole law of the state where the act or omission occured". 369 U.S. at 11.

The decision of the Court of Appeals in this case conflicts with the rule of law adopted in Richards. The Fourth Circuit found that the "whole law" of the state concerning the application of the Virginia malpractice cap to the United States was not controlling. Instead, the Court rejected the Virginia Supreme Court's finding that the United States was not subject to the cap under state law, and held that federal law should be controlling on that issue. The Fourth Circuit did not and could not cite any "persuasive evidence" that Congress intended to displace state law on the question of what constitutes "similar circumstances" in imposing liability under state law. As in Richards, the state law

determination on this issue should have controlled the outcome in this case.

In Rayonier Incorporated v. United States, 352 US 315, 319 (1957), in finding the United States accountable for the negligence of its fire fighters, the Court stated that it is "novel and unprecedented" but that the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.

In ruling that the United States was liable, this Court further found that state law would be the law to use in imposing liability:

> These provisions, given their plain natural meaning, make the United States liable to petitioners for the Forest Service's negligence in fighting the forest fire if, as alleged in the complaints, Washington law

> would impose liability on private persons or corporations under similar circumstances. at 318.

Further, in following United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 383 (1949), this Court said "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." 352 U.S. at 320.

This Court also noted that "The Federal Tort Claims Act waives the Government's immunity from suit in sweeping language. It unquestionably waives it in favor of an injured person". United States v. Yellow Cab, 340 U.S. 543, 547 (1951) (emphasis ours).

The Act was designed for the benefit of the wronged and injured plaintiff, the victim of negligence on the part

of the Government or one of its employees. United States v. Muniz, 374 U.S. 150 (1963); Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955). In spite of the Government's argument that the liability would be a heavy financial burden, this Court ruled that Congress saw fit to impose such liability as spreading it among those who contribute to support the Government and the burden is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Rayonier, 352 U.S. at 320.

Therefore, this Court has repeatedly emphasized that it is inconsistent with the purpose of the Federal Tort Claims Act, based upon its legislative history and wording, to "whittle" its waiver of immunity "down by refinements". United States v. Yellow Cab, 340 U.S. at

550. This Court further noted that legislative attempts previous to the passage of the Act to restrict its scope were rejected by Congress and omitted from the final report on the Act. This Court also stated that, "the exemption of the sovereign from suit involves hardship enough, where consent to sue has been withheld, the Court would not add to its rigor by 'refinement of construction' where consent has been announced." United States v. Yellow Cab, 340 U.S. at 554, quoting Anderson v. John C. Hayes Constr. Co, 243 N.Y. 140, 147.

In Indian Towing Co. v. United States, 350 U.S. at 69, this Court added that it should not import immunity back into a statute designed to limit it. This is precisely what the Fourth Circuit did in Starns, infra. See also United States v. Muniz, 374 U.S. 150, 165-66 (1963), wherein this Court rejected attempts to

"narrow the remedies provided by Congress" holding:

> We should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress. As we said in Rayonier, Inc., v. United States, supra, 352 U.S. at 320, 77 S.Ct. at 377, "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."

There are certain enumerated exceptions to waiver of sovereign immunity in the Act (Appendix pages 32-35). These exceptions are to be the only limiting factors to waiver of immunity by the Government. For non-enumerated actions, waiver of immunity is total.

The Federal Tort Claims Act is entitled to:

> a construction that will accomplish (its) aim; that is, one that will carry out the legislative purpose of allowing

> suits against the Government for negligence with due regard for the statutory exceptions to that policy. In interpreting the exceptions to the generality of the grant, courts include only those circumstances which are within the words and reason of the exception.

Dalehite v. United States, 346 U.S. 15, 31 (1953). Accord, Kosak v. United States, 465 U.S. 848, 853 n.9 (1984).

This Court noted that "where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule [of strict construction] cannot be had in order to enlarge the exceptions". United States v. Yellow Cab, 340 U.S. at 548 n.5 quoting Employers' Fire Insurance Co. v. United States, 167 F.2d 655, 657 (9th Cir. 1948).

It is clear that the tort committed in this case does not lie within

one of the enumerated exceptions to the coverage of the Act, nor does the Federal Tort Claims Act limit the waiver of sovereign immunity.

Secondly, as to the law of the place where the act occurred, the Fourth Circuit held in the case at bar that:

> The FTCA provides that the Government "shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. §2674 (1988). The FTCA assures the Federal Government of that treatment accorded private parties. The Government's liability is to be determined "in accordance with the law of the place where the [negligent] act or omission occurred." 28 U.S.C. §1346(b) (1988). Accordingly, Virginia law, as applied to private parties in "like circumstances" determines the extent of the Government's liability in this case. Since private health care providers in Virginia would in "like circumstances" be entitled to the benefit of §8.01-581.15, so, too, is a federally operated hospital in that state. 923 F.2d at 34.

Although the Fourth Circuit appears by the language of its holding to apply Virginia substantive law in determining who a private party in like circumstances is in this case by the language:

> since private health care providers in Virginia would in like circumstances be entitled to the benefit of section 8.01-581.15 so, too, is a federally operated hospital in that state.
> 923 F.2d at 34.

it completely disregards the decisions of this Court as to the application of state law and disregards 28 U.S.C. §1652 which provides that state laws are rules of decision. It ignores the legislative intent of the Virginia General Assembly in passing §8.01-581.15, as set out in the Interim Report of The Commission To Study The Costs and Administration of Health Care Services To the Governor and the General Assembly of Virginia, Senate Document Number 29 (Appendix pages 30-31).

It is directly opposite and contrary to the decisions of the Virginia Supreme Court and other Virginia courts on the same issue, which argument is set out more fully in Section III infra.

In Richards v. United States, 369 U.S. 1, 7 (1962), this Court found that the Act was closely tied to state law:

> We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, but should look to the provisions of the whole law, and to its object and policy. We should not assume that Congress intended to set the courts completely adrift from state law with regard to questions for which it has not provided a specific and definite answer in an act such as the one before us which, as we have indicated, is so intimately related to state law. Thus, we conclude that a reading of the statute as a whole, with due regard to its purpose, requires application of the whole law of the State where the act or omission occurred.

When the Federal Tort Claims Act was passed, Congress included in §1346(b)

the language that the Government's liability was to be determined in accordance with the laws of the place where the act or omission occurred. This followed the holding in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) wherein this Court was faced with the very same question posed by this case: whether the federal court was free to disregard a state law. This Court found that question of such importance that it granted certiorari and at 69 held:

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general", be they commercial law or a part of the law of torts. And no clause in the Constitution pur-

> ports to confer such a power upon the federal courts.

In establishing the importance of state law at 70, it further stated:

> The authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.

In following Erie and the Congressional intent, this Court has consistently held that the Federal Tort Claims Act:

> should be construed to fit, so far as will comport with its works, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole . . . It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit. Feres v. United States, 340 U.S. 135, 138 (1950).

In pointing out the significance that the Act makes the law of the place where the act or omission occurred, this Court said:

> This provision recognizes and assimilates into federal law the rules of substantive law of the several states among which divergencies are notorious. Feres at 139.

The Fourth Circuit ignored this Court's decisions when it based it's findings on the laws of other states and other circuits:

> Other circuits have agreed that limitations similar to the one involved here, which purport to apply only to state-licensed health care providers, apply to the United States. See Reilly v. United States, 863 F.2d 149, 162 (1st Cir. 1988); Taylor v. United States, 821 F.2d 1428, 1431 (9th Cir. 1987), cert. denied, 485, U.S. 992 (1988); Lucas v. United States, 807 F.2d 414, 417 (5th Cir. 1986). See also Scheib v. Florida Sanitarium & Benevolent Ass'n, 759 F.2d 859, 863-64 (11th Cir. 1985).

These cases should not have been relied upon for the following reasons:

- The Virginia Supreme Court had made a ruling in the instant case upon questions certified to it by the District

Court, that the Virginia Medical Malpractice Act did not apply to this case and based its decision upon a previously decided case concerning who would be a health care provider under §8.01-581.15 and, therefore, have the benefit of the medical malpractice cap.

- The case of Lucas v. United States is a case involving the Texas medical malpractice act which has been found to be unconstitutional. Lucas v. United States, 757 S.W.2d 687 (Texas, 1988).

The Fourth Circuit's decision conflicts with the holding of this Court in Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 834 n.9 (1978) which concerned the construction of a Virginia statute and its constitutionality under the First Amendment. In refusing to rule contrary to the Virginia Supreme

Court's construction of its statute, this Court stated:

> . . . it is not our function to construe a state statute contrary to the construction given it by the highest court of a state." O'Brien v. Skinner, 414 U.S. 524, 531 (1974)

III. THE COURT BELOW DECIDED A FEDERAL QUESTION IN DIRECT CONFLICT WITH A STATE COURT OF LAST RESORT

The Fourth Circuit Court's application of the Virginia Medical Malpractice Act is in direct conflict with the intent of the Virginia legislature in passing the Medical Malpractice Act; is contrary to the language of the Act; and is in direct conflict with the rulings of the Virginia Supreme Court in this case and in other cases involving who falls within the Act and, therefore, may have the benefit of the cap on damages.

The legislative history of the Virginia Medical Malpractice Act is best

set out by the Supreme Court of Virginia in the case of Etheridge v. Medical Center Hospitals, et at., 237 Va. 87, 93-94, 376 S.E.2d 525, 527-528 (1989), wherein the Court referred to the study and report which was incorporated into Senate Document Number 29 entitled "Interim Report of the Commission to Study the Costs and Administration of Health Care Services to the Governor and the General Assembly of Virginia", upon which the General Assembly found that the increase in medical malpractice claims was directly affecting the premium cost for, and the availability of, medical malpractice insurance. Without such insurance, health care providers could not be expected to continue providing medical care for the Commonwealth's citizens. Because of this threat to medical care services, the General Assembly, in 1976, enacted the

Virginia Medical Malpractice Act (the Act). Acts 1976, c. 611.

The need and reasons for the legislation are stated in the Preamble to the Act:

> Whereas, the General Assembly has determined that it is becoming increasingly difficult for health care providers of the Commonwealth to obtain medical malpractice insurance with limits at affordable rates in excess of $750,000.00; and
>
> Whereas, the difficulty, cost and potential unavailability of such insurance has caused health care providers to cease providing services or to retire prematurely and has become a substantial impairment to health care providers entering into practice in the Commonwealth and reduces or will tend to reduce the number of young people interested in or willing to enter health care careers; and
>
> Whereas, these factors constitute a significant problem adversely affecting the public health, safety and welfare which necessitates the imposition of a limitation on the liability of health care providers in tort actions commonly referred to as medical malpractice cases[.]

The General Assembly concluded, therefore, that escalating costs of medical malpractice insurance and the availability of such insurance were substantial problems adversely affecting the health, safety, and welfare of Virginia's citizens. Id. Thus, the General Assembly made a judgment that passage of the Act, including Code §8.01-581.15, was an appropriate means of addressing the problem.

It is important that the Virginia legislature in passing the Act looked at the status of the federally owned and operated hospitals within Virginia and found:

> There are 129 hospitals in Virginia. Eleven of these are within the federal jurisdiction. Since the Federal Government self-insures, we are concerned primarily with the malpractice insurance problem faced by Virginia's remaining 118 non-federal hospitals.

It is clear that the Virginia legislature did not intend for the United States to be included within those for which the Act was passed.

The Fourth Circuit reaffirmed this holding in Etheridge in the case of Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989).

An analysis of the language of §8.01-581.15 and §8.01-581.1 is crucial. First, the limitation on recovery applies only to a verdict returned against a health care provider. Also, §8.01-581.15 specifically provides that:

> in interpreting this section, the definitions found in 8.01-581.1 of the Code of Virginia shall be applicable (emphasis ours).

Therefore, in order to apply the limits of §8.01-581.15, the United States must fall within the definition of §8.01-581.1. Licensing is an essential requirement in order to fall within the purview of the

Act. The United States does not because it is not licensed and cannot be assumed to be so nor deemed to be so based upon the Supreme Court of Virginia decisions of Richman and Starns, supra.

As stipulated to and entered into by the United States as a Consent Order of July 7, 1988, the doctors were agents of the United States. Under the definition of paragraph 1 of §8.01-581.1, "Health Care Provider", an employee or agent acting in the cause and scope of his employment is not included within the statute as being a health care provider.

Paragraph 2 of §8.01-581.1, in defining "physician", requires that it be a person licensed to practice medicine or osteopathy in this Commonwealth . . .

The United States is not a physician within this definition. It cannot be assumed that the doctors at the

Army hospital were licensed in Virginia and would, therefore, make the United States a physician. Under the exclusion of the definition of health care provider, "employees" and "agents" are not health care providers.

The Fourth Circuit was wrong in applying the Virginia medical malpractice cap under the case law of Virginia.

In Richman v. National Health Laboratories, 235 Va. 353, 367 S.E.2d 508 (1988), the Virginia Supreme Court held that an entity not licensed by the Commonwealth could not have been intended to be included in §8.01-581.1 as a health care provider. The laboratory was not licensed by the Commonwealth but was licensed by the Federal Government. In its opinion, the Virginia Supreme Court at S.E. 510-511 emphasized the words:

> Health care provider means a person, corporation, facility or institution licensed by this Commonwealth.

and held:

> . . . the statute states specifically that it applies to certain facilities or institutions "licensed" by the Commonwealth. We take the statute as it is written. Thus, the fact that the Lab is not licensed by the Commonwealth means that the Lab is not a health care provider under the opening language of the definitional provision . . .
>
> Rules of liberal construction cannot properly be applied to rewrite a statute in order to alter what it actually says.

In Samuel v. V.C.U. Obstetrics and Gynecology Assoc., Cir. Court of Richmond, decided November 23, 1988, the Court in a Letter of Memorandum Decision clarified Richman by rejecting the suggestion that if a particular entity is mentioned in the malpractice cap statute or impliedly should be so included, the licensing requirement does not apply and

the entity, even if not licensed by the Commonwealth, is covered by the Act. In Richman, the Supreme Court recognized a two-prong test to see if the Medical Malpractice Act applied to an entity. First the entity must be licensed by the Commonwealth to provide health care or professional services. Secondly, it has to be one of the entities listed in the statute or entity which, though not mentioned, should be included in the statute. In Samuel, the Court emphasized that satisfying the second part of the two-prong test, though not the first, would not bring the malpractice cap into play.

The Richman case, a Virginia Supreme Court precedent, is the clear, valid and uncontradicted law in Virginia. The recent landmark Virginia Supreme Court case of Etheridge, does not contradict Richman. Richman was, indeed, mentioned

favorably by the dissent in Etheridge. The majority in Etheridge did not mention this issue at all as it has been definitely settled by their own previous precedent case of Richman.

The majority in Etheridge, however, did further emphasize the point made in Richman by stressing the purpose for passage of the Virginia Medical Malpractice Act.

In Gonzalez v. Fairfax Hospital System, 239 Va. 307, 310, 389 S.E.2d 458, 459 (1990), the Virginia Supreme Court set out the definitions of malpractice, health care provider and health care and held:

> It is well-settled that when a statute is clear and unambiguous, its plan meaning must be accepted without resort to extrinsic evidence or the rules of construction . . . The relevant language in the Act, specifically the definitions of "health care", "health care provider", and "malpractice" is clear and unambiguous.

In this case, the District Court certified questions to the Virginia Supreme Court which interpreted the Virginia Medical Malpractice Act and found that it did not apply and, therefore, the United States could not benefit from the limit on damages.

The United States does not fall within the cap for the following reasons:

1. On the face of the statute, the United States was not included as one who could have the benefit.

2. The Virginia legislature did not intend for it to be included.

3. In its decisions, the Supreme Court says it is not covered.

4. The whole reason behind the law, i.e. lowering of medical malpractice insurance rates, does not apply to the United States as it self-insures.

The Fourth Circuit in Boyd v. Bulala adopted completely the findings of the Virginia Supreme Court in response to the Fourth Circuit's certified questions, two of which were that the Virginia Medical Malpractice Act was constitutional under the Constitution of the United States and under the Constitution of Virginia. The constitutionality of the Act was not clearly raised in the case at bar. However it is important to note that Due Process and Equal Protection issues were raised in the Petition for Rehearing after the Fourth Circuit ruled that the Act was constitu- tional. At the time of trial, the Virginia medical malpractice cap had been found to be unconstitutional. Boyd v. Bulala, 647 F.Supp. 781, 789 (W.D. Va. 1986).

For the reasons set forth, the opinion of the Fourth Circuit is inconsistent and conflicts with this Court's interpretation of the same statutes.

CONCLUSION

There is a continuing conflict among the circuit courts of appeal and with decisions of this Court concerning the interpretation of the "like circumstances" "private person" and "law of the place where the act or omission occurred", as used in 28 U.S.C. §1346(b) and 28 U.S.C. §2674.

The denial by the appellate court of an award of damages under the Federal Tort Claims Act warrants a review by this Court.

The conflict between the circuits on this part of §1346(b) and §2674 is as great if not greater than the conflict in Molzof v. United States, 911 F.2d 18 (7th Cir. 1990) to which this Court granted a writ of certiorari on March 18, 1991. This Court's decision in Molzof will significantly impact the questions

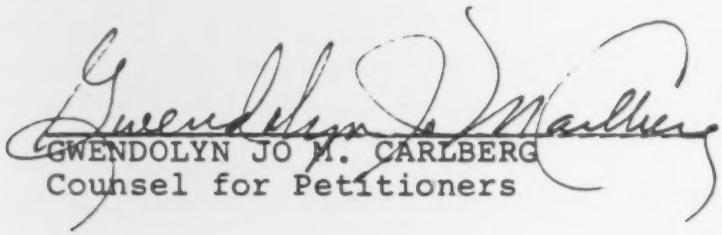
presented here since the fundamental issue here is whether Congress intended state or federal law to determine whether the United States could be found liable under the Virginia medical malpractice cap. It would, therefore, be appropriate to hold this case so that the Fourth Circuit could re-evaluate its decision in light of this Court's decision in Molzof.

Respectfully Submitted,

GWENDOLYN JO M. CARLBERG
Attorney for Petitioners
John F. Starns, Beverly J.
Starns and Jeffrey A. Starns
420 South Washington Street
Alexandria, Virginia 22314
703/549-5551

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed by United States first class mail, postage prepaid, to Scott Ramsey McIntosh, Robert Stephen Greenspan and Richard Alan Olderman, Counsel for the United States, U.S. Department of Justice, 10th and Pennsylvania Avenue, N.W. Room 3617, Washington, D.C. 20530, on this 1st day of May, 1991.



GWENDOLYN JO M. CARLBERG
Counsel for Petitioners

APPENDIX

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UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 89-2789

JOHN F. STARNS, et al.

Plaintiff - Appellant

versus

UNITED STATES OF AMERICA

Defendant - Appellee

and

R. NOBARIAN; JANET SPITZER

Defendants

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, District Judge. (CA-88-220-A; CA-88-0221-A; CA-88-0222-A)

Argued: October 29, 1990

Decided: January 9, 1991

Before CHAPMAN, Circuit Judge, BUTZNER, Senior Circuit Judge, and HOUCK, United States District Judge for the district of South Carolina, sitting by designation.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Chapman wrote the opinion, in which Senior Judge Butzner and Judge Houck joined.

ARGUED: Gwendolyn Jo M. Carlberg, LAW OFFICES OF GWENDOLYN JO M. CARLBERG, Alexandria, Virginia, for Appellants. Richard Alan Olderman, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Stuart M. Gerson, Assistant Attorney General, Robert S. Greenspan, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Henry E.

Hudson, United States Attorney, Alexandria, Virginia, for Appellee.

CHAPMAN, Circuit Judge:

Plaintiffs-appellants John and Beverly Starns and their minor child, Jeffrey, brought a medical malpractice action against the United States under the Federal Tort Claims Act ("FTCA") for negligent care rendered to Jeffrey at the DeWitt Army Community Hospital following his birth. The United States did not contest liability, and the district court awarded damages in the amount of $750,000 (the amount of the Virginia Medical Malpractice Act ("VMMA") cap) to Jeffrey and $295,780 to Mr. and Mrs. Starns. The critical issue on this appeal is whether the VMMA cap applies to federal hospitals. The appellants contend that it does not. Additional issues raised by the appellants include whether the district court erred: (1) in failing to make adequate awards of damages, (2) in applying a 9.25 percent

discount rate, and (3) in failing to increase the ad damnum for each plaintiff. Because we hold that the VMMA cap is applicable, the remaining assignments of error raised by the appellants are moot. The United States challenges the district court's application of two caps to the claims in this case and the determination of post-judgment interest. We agree with the United States on these issues and affirm in part and reverse in part.

I.

Jeffrey Starns was born on June 3, 1982 to John and Beverly Starns. From June 4 to June 6, 1982, Jeffrey and Mrs. Starns were patients at the DeWitt Army Community Hospital. On June 6, 1982, both were discharged. The next day Jeffrey was rushed to Walter Reed Army Medical Center whee emergency surgery was performed to arrest an intracranial hemorrhage.

Jeffrey suffered severe permanent mental and physical injuries as a result of the medical treatment he received at the DeWitt Army Community Hospital from June 4 through June 6, 1982. The United States concedes that the staff at the hospital acted negligently in failing to diagnose and treat Jeffrey's intracranial bleeding and that their negligence caused his injuries. As a direct result of such negligence, Jeffrey is permanently mildly to borderline retarded with an intelligence quotient of between sixty-three and seventy. Jeffrey lacks the capacity to reason and performs a couple of years behind his chronological age group. It is highly unlikely that Jeffrey will be able to obtain competitive employment; however, he will be able to assume sheltered employment. Jeffrey also suffers from hydrocephalus (water on the brain),

seizures, poor coordination and a loss of vision in his left peripheral visual field and lower left quadrant.

On June 14, 1982, all three plaintiffs filed individual administrative claims with the DeWitt Army Community Hospital. Subsequently, three lawsuits were filed in federal district court, and a trial was held. The parties stipulated to calculations of Jeffrey's projected lifetime expenses for medical treatment, education and therapy, and care and housing.

II.

Before reaching a decision, the district court certified the following questions to the Supreme Court of Virginia:

1. Does the medical malpractice cap set forth in §8.01-581.15 of the Virginia Code violate the Virginia Constitution?

2. Does the medical malpractice cap set forth in §8.01-581.15 of the Virginia Code violate the United States Constitution?

3. Does the medical malpractice cap set forth in §8.01-581.15 of the Virginia Code apply to all three petitioners together or does it apply to each of the petitioners individually?

4. Does the medical malpractice cap set forth in §8.01-581.15 of the Virginia Code apply to this case, given that the DeWitt Army Community Hospital is federally operated and is not licensed by the Commonwealth of Virginia?

In an unpublished per curiam opinion, the Supreme Court of Virginia (1) found the statute constitutional under both the Virginia and federal constitutions, (2) refrained from answering whether the statute applied to each plaintiff

individually, and (3) held that the malpractice cap did not apply to federally operated hospitals not licensed by the state.

The district court issued an opinion on July 27, 1989. First, the district court held that all three petitioners were bound by their administrative claims, because they had offered no newly discovered evidence or proof of intervening facts as required by 28 U.S.C. §2675(b) (1988). Then the district court observed that its findings on Jeffrey's damages for future medical expenses, education, housing, and pain and suffering which were in excess of $4,600,000 had largely "been rendered moot" by application of the Virginia statutory cap. The court held that although the Virginia Supreme Court had ruled that the cap did not apply to federal hospitals not

licensed by the state, "[t]he Virginia legislature's intent is not determinative in a suit involving the FTCA."

The court applied the cap to Jeffrey and his parents separately and awarded Jeffrey $750,000 and awarded the parents the full amount of the damages assessed, $295,780: $270,000 to Mrs. Starns for the value of her past services rendered to Jeffrey; $13,771 to Mr. Starns for his lost wages; and $12,009 to Mr. and Mrs. Starns for hospital, doctor and travel expenses incurred on Jeffrey's behalf. The court also awarded post-judgment interest running from the date of judgment.

III.

We first address whether the district court correctly found that the VMMA cap limits the liability of the federal government. Since this is a question of

law, we review it de novo. Taylor v. United States, 821 F.2d 1428, 1430 (9th Cir. 1987), cert. denied, 485 U.S. 992 (1988).

Virginia enacted the Virginia Medical Malpractice Act in 1976. Section 8.01-581.15, as originally written and relevant here, provides:

> In any verdict returned against a health care provider in an action for malpractice where the act or acts of malpractice occurred on or after April one, nineteen hundred seventy-seven which is tried by a jury or in any judgment entered against a health care provider in such an action which is tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed seven hundred fifty thousand dollars.

The statute defines "health care provider" as "a person, corporation, facility or institution licensed by this Commonwealth to provide health care or professional

services." Va. Code Ann. §8.01-581.1(1) (1984).

Appellants argue that because the definition of health care provider only includes facilities licensed by the Commonwealth and since federally operated hospitals are not licensed by the state, the cap does not apply to them. This argument, however, overlooks the fact that the sources of the government's liability is the FTCA and not the VMMA's cap. See Lucas v. United States, 807 F.2d 414, 417 (5th Cir. 1986). In a suit under the FTCA, a plaintiff may only recover against the government to the extent the government has waived its sovereign immunity. While Virginia law informs us on how a private party would be treated, it is incapable of telling us to what extent the federal government has waived its sovereign immunity. See Reilly v.

United States, 863 F.2d 149, 162 (1st Cir. 1988); Lucas, 807 F.2d at 417.

The FTCA provides that the government "shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. §2674 (1988). The FTCA assures the federal government of that treatment accorded private parties. The government's liability is to be determined "in accordance with the law of the place where the [negligent] act or omission occurred." 28 U.S.C. §1346(b) (1988). Accordingly, Virginia law, as applied to private parties in "like circumstances," determines the extent of the government's liability in this case. Since private health care providers in Virginia would in "like circumstances" be entitled to the benefit of Section 8.01-581.15, so, too,

is a federally operated hospital in that state.

Other circuits have agreed that limitations similar to the one involved here, which purport to apply only to state-licensed health care providers, apply to the United States. See Reilly v. United States, 863 F.2d 149, 162 (1st Cir. 1988); Taylor v. United States, 821 F.2d 1428, 1431 (9th Cir. 1987), cert. denied, 485 U.S. 992 (1988); Lucas v. United States, 807 F.2d 414, 417 (5th Cir. 1986). See also Scheib v. Florida Sanitarium & Benev. Ass'n, 759 F.2d 859, 863-64 (11th Cir. 1985).

IV.

Although we affirm the district court's decision to apply the cap, its application to the claims in this case was erroneous. As we held in Boyd v. Bulala, 905 F.2d 764 (4th Cir. 1990), based on

certified questions to the Virginia Supreme Court, "the cap applicable to any single patient's injury covers both compensatory and punitive damage claims of the patient and any claims by others that, by substantive law, are 'derivative' of the patient's claim." Id. at 767. Claims of emotional distress caused by injury to a single patient and claims for medical expenses of a single patient are derivative. Id.

Thus, all claims arising out of Jeffrey's injuries are subject to one statutory cap. Since the damages awarded to Mr. and Mrs. Starns for the value of Mrs. Starns' past services, for lost wages of Mr. Starns, and for hospital and travel expenses incurred on behalf of Jeffrey are derivative, they must be included within Jeffrey's cap. Accordingly, the limit for all damages in this case is $750,000.

This limitation renders the appellants' other assignments of error moot.

In Boyd, we also addressed how damage awards in excess of a cap should be apportioned among the claims. Reduction of the awards should occur in the following order: "first, awards based on derivative claims of others than the patient; next, punitive damage awards to the patient; last, compensatory damage awards to the patient." Id. Since the compensatory claim of Jeffrey exceeds $750,000, the derivative claims of Mr. and Mrs. Starns must be annulled.

V.

The United States appeals the calcultion of post-judgment interest from the date of judgment contending that 31 U.S.C. §1304(b)(1)(A) (1988) controls. We agree. Interest cannot be awarded against the government in the absence of express

statutory authority. The section authorizing payment of judgments against the United States in an FTCA suit is 28 U.S.C. §2414 (1988) which is specifically listed in section 1304. Accordingly, section 1304 applies in this case. See Lucas v. United States, 807 F.2d 414, 423 (5th Cir. 1986). Section 1304(b)(1)(A) provides that interest may be paid "on a judgment of a district court, only when the judgment becomes final after review on appeal . . . and then only from the date of the filing of the transcript with the Comptroller General through the day before the date of the mandate of affirmance." Therefore, interest must be recalculated as provided in §1304(b)(1)(A).

VI.

For the foregoing reasons, we affirm the district court's finding that federal hospitals are entitled to the benefit of

the VMMA cap but reverse its holding that derivative claims are not subject to the single cap. We also reverse the district court's calculation of post-judgment interest. We remand to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

No. 89-2804

JOHN F. STARNS, et al.

Plaintiffs-Appellants

versus

UNITED STATES OF AMERICA

Defendant-Appellee

and

JANET SPITZER, R. NOBARIAN

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellants/cross-appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggesion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the discretion of Judge Chapman with the concurrence of Judge Butzner and Judge Houck, United States District Court Judge sitting by designation.

For the Court,

(John M. Greacen) /S/
Clerk

No. 89-2804

JOHN F. STARNS, et al.

Plaintiffs-Appellants

versus

UNITED STATES OF AMERICA

Defendant-Appellee

and

JANET SPITZER, R. NOBARIAN

Defendants

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria

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Pursuant to Local Rule 28* and Internal Operating Procedure 28.2, IT IS ORDERED that:

1. these cases are consolidated;

2. John, Jeffrey, and Beverly Starns are deemed the appellants for the purposes of briefing, preparation of the appendix and oral argument;

3. one joint brief shall be permitted per side;

4. the parties on each side shall share the time allowed for oral argument;

5. each side shall notify the Court of the attorney who has been designated as lead counsel within ten days of the date of this order.

For the Court - By Direction

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
VIRGINIA
Alexandria Division

JOHN F. STARNS

Plaintiff

v. CA No. 88-0220-A

UNITED STATES OF AMERICA, et al.

Defendants

JEFFREY A. STARNS

Plaintiff

v. CA No. 88-0221-A

UNITED STATES OF AMERICA, et al.

Defendants

BEVERLY J. STARNS

Plaintiff.

v. CA. No. 88-0222-A

UNITED STATES OF AMERICA, et al.

Defendants

ORDER

In accordance with the Opinion for the United States Court of Appeals for the Fourth Circuit, it is accordingly

ORDERED that judgment is hereby entered in favor of the plaintiff, Jeffrey A. Starns, and against the defendant, United States of America, in the amount of $750,000 plus costs and interest as required by law. It is further,

ORDERED that the claims of plaintiffs John and Beverly Starns are dismissed with prejudice.

/S/
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
VIRGINIA
Alexandria Division

JOHN F. STARNS

Plaintiff

v. CA No. 88-0220-A

UNITED STATES OF AMERICA, et al.

Defendants

JEFFREY A. STARNS

Plaintiff

v. CA No. 88-0221-A

UNITED STATES OF AMERICA, et al.

Defendants

BEVERLY J. STARNS

Plaintiff.

v. CA. No. 88-0222-A

UNITED STATES OF AMERICA, et al.

Defendants

ORDER

This case is before the Court on the Plaintiffs' motions to increase the ad damnum clauses in their complaints and the Defendant's motion for reconsideration to reduce the ad damnum clause in Plaintiff Jeffrey A. Starns' complaint. For the reasons stated from the bench, it is accordingly ORDERED that the Defendant's motion to reconsider the Court's earlier ruling on the ad damnum clause in Plaintiff Jeffrey A. Starns' complaint is DENIED.

The Court will take the Plaintiffs' motions to increase the ad damnum clause in their complaints under advisement and leave a decision on that issue to the discretion of the trial judge, if any is permitted by the Federal Tort Claims Act.

Let the Clerk send a copy of this Order to all counse of record.

8/29/88 /S/
Date United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
VIRGINIA
Alexandria Division

JOHN F. STARNS

Plaintiff

v. CA No. 88-0220-A

UNITED STATES OF AMERICA, et al.

Defendants

JEFFREY A. STARNS

Plaintiff

v. CA No. 88-0221-A

UNITED STATES OF AMERICA, et al.

Defendants

BEVERLY J. STARNS

Plaintiff.

v. CA. No. 88-0222-A

UNITED STATES OF AMERICA, et al.

Defendants

ORDER

For reasons stated in open court, it is accordingly ORDERED:

(1) that the defendant United States of America's Motion to Reduce the Ad Damnum Clauses in Plaintiffs' Complaints to $750,000 is DENIED without prejudice.

(2) that the defendant United States of America's Motion to Dismiss Plaintiffs' Claim for Negligent Infliction of Emotional Distress is GRANTED.

(3) that the Clerk shall forward copies of this Order to all counsel of record.

7/29/88 /S/
Date United States District Judge

INTERIM REPORT OF THE
COMMISSION TO STUDY THE COSTS AND
ADMINISTRATION OF HEALTH CARE SERVICES
TO THE GOVERNOR AND THE GENERAL ASSEMBLY
OF VIRGINIA

Senate Document No. 29

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supply
Richmond
1976

EXHIBIT I

MEDICAL MALPRACTICE INSURANCE IN VIRGINIA:

THE SCOPE AND SEVERITY OF THE
PROBLEM AND ALTERNATIVE SOLUTIONS

State Corporation Commission
Bureau of Insurance
Richmond, Virginia
November, 1975

A. Hospital Malpractice Insurance in Virginia

There are 129 hospitals in Virginia. Eleven of these are within the federal jurisdiction. Since the Federal Government self-insures, we are concerned primarily with the malpractice insurance

problem faced by Virginia's remaining 118 non-federal hospitals.

Prior to July 1, 1974, the exposure of Virginia's hospitals to malpractice claims was limited by the legal doctrine of charitable immunity which prohibited recovery of damages against nonprofit or charitable hospitals. Approximately 70% to 80% of Virginia's hospitals were viewed as non-profit institutions. During 1974, the Virginia General Assembly abolished this immunity. This change in the law had an impact upon rates though not to the degree asserted by many.

28 U.S.C. §2680 - Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to -

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any

goods or merchandise by an officer or customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or ommission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch.1049, §33(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights:

Provided, That, with regard to act or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, batter, false imprisonment, false arrest, abuse of process or malicious prosecution. For the purpose of the subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulations of the monetary system.

(j) Any claim arising out of the combatant activities of the military or

naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

No. 90-1677

FILED
JUL 1 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN F. STARNS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ROBERT S. GREENSPAN
RICHARD OLDERMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Virginia Medical Malpractice Act, which imposes a ceiling on the amount recoverable in a medical malpractice action, limits the damages that may be recovered from the United States in an action under the Federal Tort Claims Act.

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In the Supreme Court of the United States

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No. 90-1677

JOHN F. STARNS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 923 F.2d 34. The decision of the district court (Pet. App. Under Seal 1-38) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1991. A petition for rehearing was denied on February 1, 1991 (Pet. App. 19-20). The petition for a writ of certiorari was filed on May 1, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case presents the question whether a Virginia statute that limits the amount that may be awarded in a medical malpractice action is applicable in an action brought against the United States under the Federal Tort Claims Act.

1. The Federal Tort Claims Act makes the United States liable in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. Liability is determined "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b).

The Commonwealth of Virginia has enacted a statutory cap on the amount that can be recovered in an action for medical malpractice. At the pertinent time, the Virginia Medical Malpractice Act, Va. Code Ann. § 8.01-581.15, limited the damages recoverable in an action against a "health care provider" to $750,000:

> In any verdict returned against a health care provider in an action for malpractice * * * which is tried by a jury or in any judgment entered against a health care provider in such an action which is tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed seven hundred fifty thousand dollars.[1]

The statute defines the term "health care provider" as "a person, corporation, facility or institution licensed by this Commonwealth to provide health care or professional services." Va. Code Ann. § 8.01-581.1(1).

---

[1] Virginia has since amended the statute to provide a $1,000,000 ceiling for malpractice occurring on or after October 1, 1983. Because the injury at issue occurred in 1982, the $750,000 cap is applicable to this case.

2. a. Petitioners are John and Beverly Starns and their son, Jeffrey. In 1982, Jeffrey was delivered at the DeWitt Army Hospital in Ft. Belvoir, Virginia. The delivery was normal, but thereafter the medical staff failed to diagnose and treat an intracranial hemorrhage. A day after his discharge, Jeffrey was admitted to the Army's Walter Reed Hospital and underwent surgery to correct the hemorrhage. Despite surgery, he suffered severe and permanent mental and physical injuries. Pet. App. 5-6.

After administrative claims filed with the Army were denied, each petitioner filed a separate action for damages under the Federal Tort Claims Act. Each complaint alleged that Jeffrey's injuries were caused by his negligent treatment at the DeWitt Army Hospital. The three actions were consolidated. The United States conceded liability, but contested the amount of damages. Pet. App. 6-7.

b. The district court certified several questions to the Virginia Supreme Court: whether Virginia's medical malpractice cap violated the Virginia Constitution; whether the cap violated the federal Constitution; whether a single cap was applicable to all three plaintiffs or whether each could recover up to the statutory maximum; and whether the statute applied in this case "given that the DeWitt Army Community Hospital is federally operated and is not licensed by the Commonwealth of Virginia." Pet. App. A8.

In an unpublished *per curiam* opinion, the Virginia Supreme Court held that the statute was constitutional under both the state and federal constitutions and that the statute did not apply, as a matter of state law, to federally operated hospitals not licensed by the Commonwealth. Pet. App. Under Seal 43. In view of its determination that the statute did not apply, the court reserved judgment on whether petitioners were subject to a single cap. *Ibid.*

In a subsequent opinion, the Virginia Supreme Court concluded that the question it had left open was moot as a matter of state law. The court added that its rulings "expresse[d] no opinion concerning the effect of the several federal statutes and decisions cited by the Defendant, the United States of America, upon the applicability of the Virginia medical malpractice cap to a multiple-plaintiff malpractice award." App., *infra,* 1a.

c. After receiving the Virginia court's responses to the certified questions, the district court conducted a trial limited to the issue of damages. The court found that the evidence would support an award to the child of more than $4,625,000, for future medical expenses, lost earning capacity, education, housing, and pain and suffering; an award to the mother of $270,000 for the value of her services to the child; an award to the father of $13,771 for lost wages; and an award to both parents of $12,009 for hospital and medical expenses incurred on their child's behalf. Pet. App. Under Seal 6, 37-38.

The district court concluded, however, that the damages recoverable from the United States were subject to the cap prescribed by the Virginia malpractice statute. The court acknowledged that the Virginia Supreme Court had determined, as a matter of state law, that the statutory cap did not apply to federal hospitals, since they are not licensed by the Commonwealth of Virginia. But, the district court continued, "[t]he Virginia legislature's intent is not determinative in a suit involving the FTCA." Pet. App. Under Seal 28. The court explained that under the FTCA, the United States is liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. Thus, the court reasoned, because the medical malpractice statute would have been applicable to the DeWitt Army Hospital if it had been a

private institution, Congress's waiver of sovereign immunity was limited to the amount of the cap. Any other conclusion, the court stated, " 'would contravene Congress' directive' that the United States be held liable to the same extent as a private party under similar circumstances." Pet. App. Under Seal 29-30. The district court found support for this conclusion in decisions by several courts of appeals. *Id.* at 30-32.

The district court construed the Virginia statute to provide two statutory caps for the damages recovered in this action—one for Jeffrey and one covering both parents. Accordingly, it entered judgment for Jeffrey in the amount of $750,000 and for the parents in the amount of approximately $295,000. Pet. App. 4.

3. The court of appeals affirmed the district court's determination that petitioners' recoveries were limited by the Virginia statute, but it held that a single cap was applicable to all of their claims. Pet. App. 1-18.

The court rejected petitioners' contention that the statutory cap was inapplicable by virtue of the fact that the DeWitt Army Hospital was not a "health care provider" within the meaning of state law, *i.e.*, a hospital licensed by the Commonwealth (Pet. App. 12-14):

> This argument * * * overlooks the fact that the [source] of the government's liability is the FTCA and not the [Virginia statute's] cap. * * * In a suit under the FTCA, a plaintiff may only recover against the government to the extent the government has waived its sovereign immunity. While Virginia law informs us on how a private party would be treated, it is incapable of telling us to what extent the federal government has waived its sovereign immunity. * * *
>
> The FTCA provides that the government "shall be liable * * * in the same manner and to the same extent

> as a private individual under like circumstances." 28 U.S.C. § 2674 (1988). The FTCA assures the federal government of that treatment accorded private parties. * * * Accordingly, Virginia law, as applied to private parties in "like circumstances," determines the extent of the government's liability in this case. Since private health care providers in Virginia would in "like circumstances" be entitled to the benefit of Section 8.01-581.15, so, too, is a federally operated hospital in that state.

"Other circuits," the court added, "have agreed that limitations similar to the one involved here, which purport to apply only to state-licensed health care providers, apply to the United States." Pet. App. 14.

While this case was pending on appeal, the Virginia Supreme Court held, in *Bulala* v. *Boyd,* 239 Va. 218, 389 S.E.2d 670, 676 (1990), that a single cap is applicable to the damages recoverable by a patient who has been injured by malpractice and to all other "derivative" claims. Under that interpretation, the court of appeals held, "all claims arising out of Jeffrey's injuries are subject to one statutory cap," and "the limit for all damages in this case is $750,000." Pet. App. 15. The petition does not seek further review of that determination.

ARGUMENT

The court of appeals correctly applied the plain language of the Federal Torts Claims Act. There is no conflict between its decision and any decision of this Court or of another court of appeals. Further review is not warranted.

1. The FTCA provides that the United States is liable in tort actions "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674, and that liability is determined "in accord-

ance with the law of the place where the act or omission occurred," 28 U.S.C. 1346(b). As this Court noted in *Rayonier* v. *United States,* 352 U.S. 315, 319 (1957), "the test * * * for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred." The same standard applies to both liability and damages. See L. Jayson, *Handling Federal Tort Claims* § 226 (1991) ("Just as the law of the state where the misconduct occurred governs the substantive tort liability, so does it govern the nature and measure of damages to be awarded. * * * [R]eference must be made to state law to determine whether there is any ceiling imposed on the amount of recovery.").

There is no dispute that the law of Virginia is applicable to this case. The Commonwealth has placed a limit on the amount that may be recovered from private health care institutions—for purposes of this case, $750,000. Had this action been brought against such a private institution "under like circumstances," 28 U.S.C. 2674, petitioners' recovery would have been limited to that sum. Under the plain language of the FTCA, therefore, the United States' is liable only "to the same extent." *Ibid.*[2]

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[2] The fact that a federal hospital is not identical to a private institution--in particular, that it is not subject to state licensing—does not make it any less appropriate to draw the analogy required by the statute. As this Court held in *Indian Towing Co. v. United States,* 350 U.S. 61, 64 (1955), the statutory language refers not to private persons under "the same circumstances," but to those under similar circumstances. See *Proud* v. *United States,* 723 F.2d 705 (9th Cir.) (United States can claim protection of Hawaii recreational use statute even though statute explicitly excludes land owned by the government, for "the United States' liability under the FTCA is that of a private individual, regardless of what a state intends that liability to be"), cert. denied, 467 U.S. 1252 (1984); *Lucas* v. *United States,* 807 F.2d 414, 417 (5th Cir. 1986) ("Texas law informs how a private party would be

Petitioners' fundamental submission is that the Virginia malpractice statute is immaterial because the Virginia Supreme Court held, in its initial decision, that the Dewitt Army Hospital is not a "health care provider" within the meaning of the statute. However, in its subsequent decision, the Virginia Supreme Court acknowledged that its ruling was not dispositive of the question presented here, saying that it had "expresse[d] no opinion concerning the effect of the several federal statutes and decisions cited by the Defendant, the United States of America, upon the applicability of the Virginia medical malpractice cap." App.,

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treated; it does not tell us, indeed it cannot, the extent to which the federal government has waived its sovereign immunity. By excluding federally operated institutions from coverage under [the cap provision], the Texas legislature simply acknowledged the limit of its power."); *Reilly* v. *United States,* 863 F.2d 149, 162 (1st Cir. 1988) ("[t]he intent of the Rhode Island General Assembly is, in a very real sense, irrelevant to the extent of the federal government's liability in an FTCA suit"); *Scheib* v. *Florida Sanitarium & Benevolent Ass'n,* 759 F.2d 859, 861 (11th Cir. 1985) (applying a Florida collateral source statute to the United States in an FTCA suit); *Simpson* v. *United States,* 652 F.2d 831 (9th Cir. 1981) (regardless of whether California's recreational use statute was intended to apply to public as well as private landowners, it must be applied to limit the United States' liability in an FTCA action for injuries to a user of a national forest recreation area); *Mandel* v. *United States,* 719 F.2d 963 (8th Cir. 1983) (similar result under Arkansas' recreational use statute); *Roelofs* v. *United States,* 501 F.2d 87 (5th Cir. 1974) (applying the exclusive remedy provisions of Louisiana's workmen's compensation law to bar a tort action against the government for an on-the-job injury to an employee of a government contractor despite the fact that the United States' sovereign immunity prevents the State from requiring the government to compensate injured workers under the statutory scheme), cert. denied, 423 U.S. 830 (1975); *Thomas* v. *Calavar Corp.,* 679 F.2d 416 (5th Cir. 1982) (same); *Griffin* v. *United States,* 644 F.2d 846 (10th Cir. 1981) (same result under Kansas Workmen's Compensation Act); *LaBarge* v. *County of Mariposa,* 798 F.2d 364 (9th Cir. 1986), cert. denied, 481 U.S. 1014 (1987).

infra, 1a. Under the plain terms of the FTCA, moreover, it is completely irrelevant what obligations state law imposes on the federal government as such; the material question is how state law treats a similarly situated private party. The court of appeals' decision is true to the answer state law provides to that question. There is no merit whatever to petitioner's repeated contentions that the court of appeals improperly disregarded state law.

2. All other courts of appeals that have addressed the question presented have reached the same conclusion as the court of appeals in this case. *Lucas* v. *United States,* 807 F.2d 414 (5th Cir. 1986); *Taylor* v. *United States,* 821 F.2d 1428 (9th Cir. 1987), cert. denied, 485 U.S. 992 (1988). *Lucas* was an FTCA action in which the government sought the benefit of the Texas statutory cap on medical malpractice damages. The Texas statute, like the Virginia law, limited damages recoverable from "health care providers" and defined that term to include only entities licensed by the state. The Fifth Circuit rejected the contention, indistinguishable from petitioner's here, that the statute was inapplicable, pointing out that "[t]his argument forgets that the source of the government's liability here is the Federal Tort Claims Act, not the Texas liability limit provision." 807 F.2d at 417. In *Taylor,* the Ninth Circuit reached the same result under another similar state statute. 821 F.2d at 1432.[3]

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[3] The district court suggested that there was a possible conflict between *Taylor* and *Gallea* v. *United States,* 779 F.2d 1403 (9th Cir. 1986). Pet. App. Under Seal 32. We do not agree; the Ninth Circuit concluded in *Gallea,* which involved the application of a state dram shop law, that "we cannot say that a private person in circumstances similar to the [federal] Club would be liable." 779 F.2d at 1406. In any event, *Taylor* is the more recent of the two cases and the one on all fours with this case, since it involved a cap on the damages available from health care providers. Moreover, an intra-circuit conflict does

3. This case should not be held for *Molzof* v. *United States,* cert. granted, No. 90-838 (Mar. 18, 1991). The question presented in *Molzof* is whether 28 U.S.C. 2674, which provides that the United States "shall not be liable * * * for punitive damages," forecloses certain forms of damages sought in that case. Petitioners were not denied any relief on the basis of the punitive damages provision, and *Molzof* does not involve a state cap on damages comparable to the one at issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ROBERT S. GREENSPAN
RICHARD OLDERMAN
Attorneys

JULY 1991

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not warrant this Court's review. *Wisniewski* v. *United States,* 353 U.S. 901 (1957).

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 28th *day of* June, 1989.

JEFFREY A. STARNS, BY AND THROUGH HIS NEXT FRIENDS AND GUARDIANS, JOHN F. AND BEVERLY J. STARNS: JOHN F. STARNS; AND BEVERLY J. STARNS, PLAINTIFFS

against Record No. 881289

UNITED STATES OF AMERICA, DEFENDANT

Upon further consideration of the order of certification entered by the United States District Court for the Eastern District of Virginia, Alexandria Division, and of the letter briefs submitted by the parties upon the question whether the third certified question is now moot, this Court is of opinion that the said question is now moot as a matter of state law. In reaching this conclusion, the Court expresses no opinion concerning the effect of the several federal statutes and decisions cited by the Defendant, the United States of America, upon the applicability of the Virginia medical malpractice cap to a multiple-plaintiff malpractice award.

A Copy,
Teste:

DAVID B. BEACH, Clerk

By: /s/ Patricia Ista
Deputy Clerk

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—282-061/20612

Supreme Court, U.S.
FILED
JUL 3 1991
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No. 90-1677

IN THE

Supreme Court of the United States

October Term, 1990

JOHN F. STARNS,
BEVERLY J. STARNS, AND
JEFFREY A. STARNS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONERS

Michael C. Maher, Esq.
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
President, Association of Trial Lawyers of America

Jeffrey Robert White*
1050 31st St., N.W.
Washington, D.C. 20007
(202) 965-3500
Attorney for Amicus Curiae
*Counsel of Record

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**BRIEF OF AMICUS CURIAE
ASSOCIATION OF TRIAL LAWYERS OF AMERICA
IN SUPPORT OF PETITIONERS**

IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this Brief of Amicus Curiae in support of Petitioner in this case. Letters evidencing the consent of all parties to the filing of this brief have been filed with the Court.

ATLA is a voluntary national bar association whose 65,000 members primarily represent injured plaintiffs in personal injury suits, including medical malpractice actions. The victims of tortious misconduct cannot be identified in advance. There is a strong temptation for legislators to grant special benefits to powerful interests at the expense of future plaintiffs who have no voice to raise in protest. ATLA has sought to serve as that voice.

Judicial deference to legislative judgments is necessarily broad. But it is not unbounded. The constitution limits the authority of legislatures to trade away the rights of powerless minorities precisely because the political process cannot safeguard those rights. When legislatures violate those boundaries, it is not usurpation for courts to declare those acts invalid. It is the judicial responsibility in a government of a people that has chosen to guard freedom by imposing checks and balances on the guardians.

For these reasons, ATLA has participated as amicus curiae in cases challenging the constitutionality of legislative caps on damages in tort actions. ATLA does so again in this case.

REASONS FOR GRANTING THE WRIT

I. THE CONSTITUTIONALITY OF STATUTORY LIMITS ON RECOVERABLE DAMAGES IN TORT ACTIONS IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

Amicus supports the petition for a writ of certiorari to review the lower court's decision to apply the Virginia cap on damages, Va. Code Ann. § 8.01-581-15 (1984), in an action arising under the Federal Tort Claims Act. Amicus respectfully suggests, however, that this case presents issues of constitutional magnitude. Amicus submits that the

Virginia cap on medical malpractice damages is inapplicable because it violates the Due Process and Equal Protection guarantees of the Fourteenth Amendment.

Petitioner advances this ground without extended discussion. See Petition at 63. The constitutional infirmity of the damage cap was not a central issue at trial. At that time, the district court had already declared the ceiling on damages unconstitutional. *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986), *aff'd on rehearing*, 672 F. Supp. 915 (1987). Nevertheless, the issue was raised and decided on appeal. Indeed, the Fourth Circuit certified questions to the Virginia Supreme Court as to the constitutionality of the statute under the Virginia and United States constitutions and adopted the state court's affirmative answer. *Starns v. United States*, 923 F.2d 34, 36 (4th Cir. 1991). The court had previously rejected arguments that the damage limit violated equal protection. *Boyd v. Bulala*, 887 F.2d 1191 (4th Cir. 1989).

Amicus suggests that the constitutionality of state statutes imposing limits on damages recoverable in tort actions is an important question of federal law which has not been, but should be settled by this Court. *See* S. Ct. Rule 17.1(c).

First, the Virginia statute is but a single instance of "tort reform" legislation which swept across the country in a wave in the mid-1970's and again in the 1980's. Nearly every state legislature enacted some restriction on the common law rights traditionally accorded to injured victims of medical malpractice. Twenty states imposed caps on the amount of damages that victims could recover from wrongdoers. *See* Farrell, *Virginia's Medical Malpractice Cap and the Doctrine of Substantive Due Process*, 23 Tort & Ins. L.J. 684 (1988)(listing state statutes). The constitutionality of these statutes will most certainly be drawn into question in federal courts, either in diversity actions, such as *Boyd v. Bulala, supra*, or in suits against the United States, such as

the present case. This Court should provide guidance to the federal courts faced with resolving difficult constitutional issues.

Second, a significant number of state courts have addressed the constitutionality of damage caps. The great weight of authority of state supreme courts holds that such limits are invalid as violative of state constitutional guarantees, including the state constitutional counterparts to the Due Process and Equal Protection Clauses. *See Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987)($450,000 cap on noneconomic damages in all tort actions violates right of access to the courts and right to trial by jury); *Wright v. Central DuPage Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736 (Ill. 1976)($500,000 cap on all medical malpractice damages violates state constitutional ban against special legislation); *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988)($1 million cap on all medical malpractice damages and $250,000 cap on noneconomic damages violates state constitutional guarantees of access to courts and jury trial); *Carson v. Maurer,* 120 N.H. 925, 424 A.2d 825 (N.H. 1980)($250,000 limit on noneconomic damages in medical malpractice cases violates equal protection); *Arneson v Olson*, 270 N.W.2d 125 (N.D. 1978)($300,000 cap discriminates against malpractice victims in violation of equal protection and due process provisions of the state and federal constitutions); *Reynolds v. Porter*, 760 P.2d 816 (Okla. 1988)(limiting malpractice victims to economic damages in cases filed over 3 years after occurrence violates guarantee against special legislation); *Lucas v. United States,* 757 S.W.2d 687 (Tex. 1988)($500,000 cap on all malpractice damages except medical expenses violates state constitutional right to a remedy); *cf., Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (Idaho 1976), cert. den. 431 U.S. 914 (1977)(court remanded to determine whether damage cap violates prohibition against special legislation; trial court

held cap unconstitutional: Nos. 55527 & 55586, Ada County 4th Dist. Ct., Nov. 3, 1980)).

Three courts have upheld medical malpractice caps. *Fein v. Permanente Med. Group*, 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 665 (1985), app. dism., 474 U.S. 895 (1985); *Johnson v. St. Vincent Hospital, Inc.*, 273 Ind. 374, 404 N.E.2d 585 (Ind. 1980); *Etheridge v. Medical Center Hosp.*, 376 S.E.2d 525 (Va. 1989).

State constitutions may, of course, grant broader rights than those mandated by the United States Constitution. It is somewhat anomalous, however, that on an issue of such significance which courts around the country must face with increasing frequency, federal and state judges must guess as to this Court's position.

Finally, it cannot be overlooked that this issue has been before this Court on a prior occasion. Following the decision by the California Supreme Court upholding that state's cap on noneconomic damages in medical malpractice cases, this Court granted review then dismissed the appeals "for want of a substantial federal question." *Fein v. Permanente Med. Group*, 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 665 (1985), app. dism., 106 S. Ct. 214 (1985). Federal courts are divided as to the precedential weight of that disposition. *Compare Coburn v. Agustin*, 627 F. Supp. 983, 993 (D. Kan. 1985), stating that the dismissal indicates only approval of the outcome of the decision below, with *Ferguson v. Garmon*, 643 F. Supp. 335, 340 (D. Kan. 1986), which interpreted the dismissal as the equivalent of this Court's adoption of both the reasoning and result of the California opinion.

Amicus respectfully suggests that the speculation concerning the meaning of this Court's action in *Fein* reflects the need for a decision by this Court on the merits.

II. THIS CASE PRESENTS IMPORTANT ISSUES UNDER THE EQUAL PROTECTION CLAUSE WHICH THIS COURT SHOULD ADDRESS.

The constitutionality of the Virginia cap on damages has been called into question by several commentators. *See* Farrell, *Virginia's Medical Malpractice Cap and the Doctrine of Substantive Due Process*, 23 Tort & Ins. L.J. 684, 703 (1988); Taylor and Shields, *The Limitation on Recovery in Medical Negligence cases in Virginia*, 16 U. Rich. L. Rev. 799, 813 (1982); Harlan, *Virginia's New Medical Malpractice Review Panel and Some Questions It Raises*, 11 U. Richmond L. Rev. 51, 66 (1976).

A primary basis for these concerns is the blatantly pretextual nature of the legislature's expressed purpose. The preamble of the statute declares that liability insurance has become unaffordable or unavailable to Virginia physicians, threatening the supply of doctors willing to practice in Virginia, and necessitating a limit on the liability of health care providers. Quoted in Petition at 53. However, the legislators had before them the report of the State Corporation Commission, which regulates insurance carriers in the state. The report and testimony by the Insurance Commission clearly stated that liability insurance was readily available in Virginia, that premiums were not unaffordable compared to income and that the number of doctors in Virginia was steadily growing. Most significantly, during the period covered, 1970-75, there was no verdict over $500,000 and only two in excess of $150,000. In other words, the $750,000 cap could not have any effect on liability premiums. This background to the statute is set out in detail in Taylor and Shields, *supra*.

The damage limit is discriminatory on its face, applying only to victims of medical malpractice and only to the most severely injured. Amicus suggests that, even if this classification is subject to the rational basis standard of

review, it cannot pass constitutional muster. This Court's decision in *City of Cleburne v. Cleburne Living Center, Inc*, 473 U.S. 432 (1985), makes it clear that courts may not accept a purported objective which is at odds with the real world in which the statute operates. Amicus submits that the question of the limits of traditional deference to legislative judgment is an important issue which this Court should address.

III. THIS CASE PRESENTS IMPORTANT ISSUES OF SUBSTANTIVE DUE PROCESS WHICH THIS COURT SHOULD ADDRESS.

In his dissent from this Court's dismissal in *Fein*, Justice White called the Court's attention to an important issue which has remained unresolved.

> Whether due process requires a legislatively enacted compensation scheme to be a *quid pro quo* for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and higher courts of several states.

474 U.S. at 894-95.

Virginia's damage cap clearly curtails the common law remedy otherwise available to seriously injured malpractice victims. Just as clearly, it offers no *quid pro quo* in its place. This Court raised, but found it unnecessary to resolve this precise issue in *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 (1978). Amicus suggest that the Court should confront this important issue on review of this case.

CONCLUSION

For these reasons, amicus urges this Court to grant the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

Jeffrey Robert White
1050 31st St., N.W.
Washington, D.C. 20007
(202) 965-3500
Attorney for Amicus Curiae
Association of Trial Lawyers of America

July 3, 1991